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No. 90-600

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

J.D. FARMER, JR.,
Petitioner
v.

STEPHEN E. HIGGINS,
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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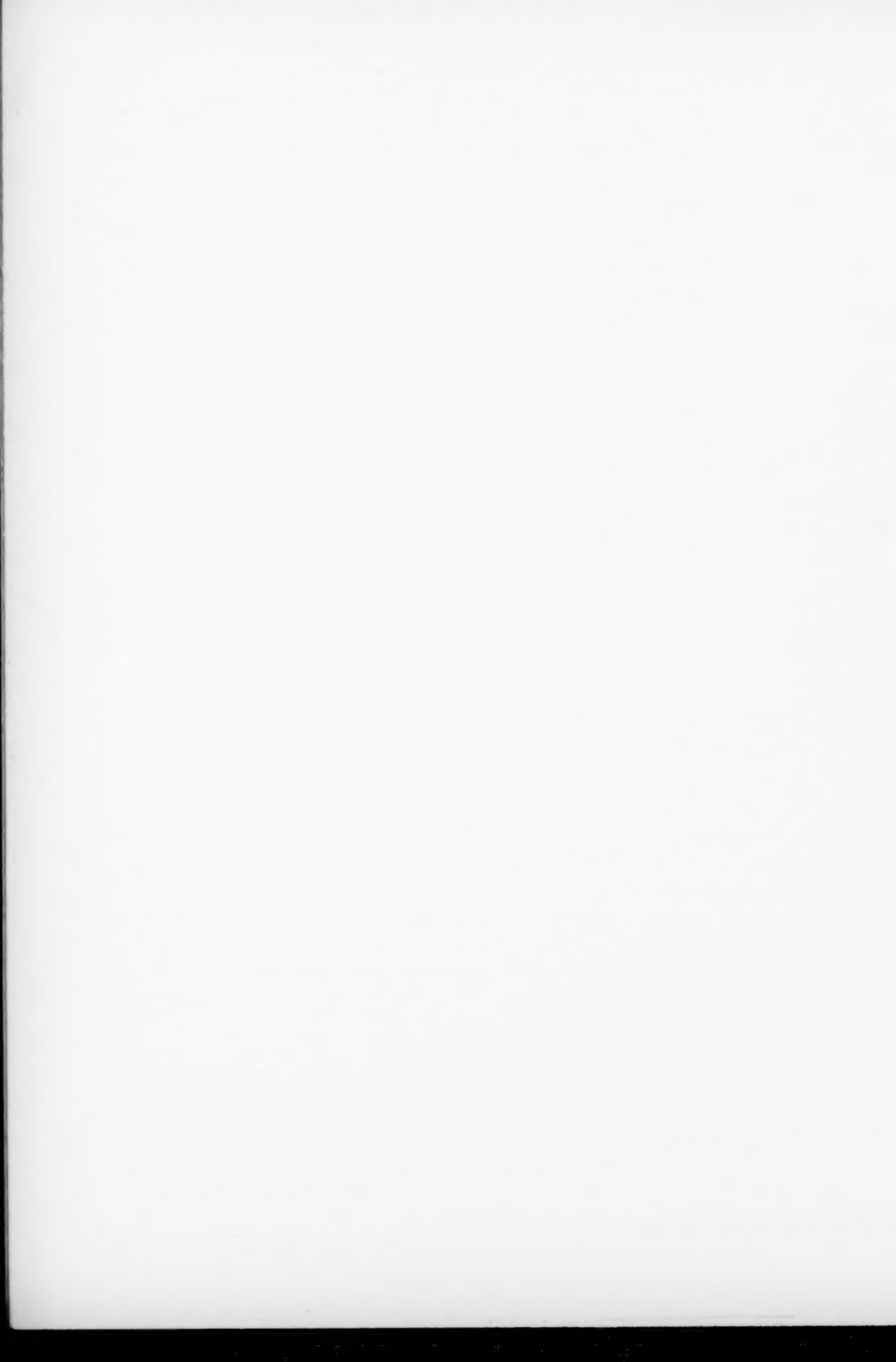
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ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO PRECLUDE THE SUPPLANTING OF THE CLEAR LANGUAGE OF AN IMPORTANT STATUTE BY AN AMBIGUOUS "INTENT" BASED ON AN UNSPOKEN COLLOQUY

Like the Court of Appeals, the respondent fails to address the clear meaning of the language of 18 U.S.C. § 922(o) "under the authority of," which simply means permission. Instead of addressing the meaning of "authority," respondent argues that petitioner's (and the district court's) interpretation would not change the status quo, thereby rendering the statutory amendment an absurd result. (Brief for the Respondent in Opposition at 7.)

Respondent fails to address the clear holding of this Court that Congress can make conduct illegal in one statute, and then make the same conduct illegal again in a separate statute. *United States v. Batchelder*, 442 U.S. 114, 120-21 (1979) (two Gun Control Act statutes making possession of firearm by felons in interstate commerce unlawful). Respondent also fails to address the fact that 18 U.S.C. § 922(o) did change existing law, because it shifted the burden of proof for possession of a machinegun, removing the government's burden to prove that the machinegun is not registered under the National Firearms Act. See Petition for a Writ of Certiorari at 12-13.

Respondent would supplant the clear language of the statute with an ambiguous comment made by Senator Hatch concerning police ownership in an unspoken colloquy inserted into the record and disputed by Senator Metzenbaum. Brief for the Respondent at 8. Respondent completely disregards the preamble to the Firearms Owners' Protection Act voted on by all members of Congress, reaffirming that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." § 1, P.L. 99-308, 100 Stat. 449 (1986).

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE RULE OF LENITY, NOT DEFERENCE TO AGENCIES, APPLIES TO INTERPRETATION OF A CRIMINAL STATUTE

Respondent fails to address this Court's holding in *Crandon v. United States*, 110 S.Ct. 997, 1001-02, 1007 (1990) and its predecessors that an ambiguous criminal statute must be interpreted according to the rule of lenity against the government and in favor of those to whom a criminal law applies. Instead, respondent mentions Justice Scalia's concurring opinion in *Crandon* that in interpretation of a criminal statute, the courts owe no deference to an agency under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Brief for the Respondent at 9.)

However, respondent is unable to squeeze from Justice Scalia's opinion any support for the argument that the courts must defer to ATF interpretations of Title 18, the criminal code, because "the ATF is a component of the Department of the Treasury and does not bring criminal prosecutions under the gun control laws; instead, that authority is vested in the Department of Justice. . . . The ATF's interpretation of the Firearms Owners' Protection Act of 1986 is therefore entitled to deference. . . ." Brief for the Respondent at 9.

The above argument was flatly rejected in *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954), which invalidated regulations under the criminal code as beyond the statutory prohibition, because "penal statutes are to be construed strictly." In that case, the FCC sought by regulation to make "give-away" programs illegal, while the statute only made gambling-related broadcasts illegal. ABC sought an order enjoining the regulations.

The FCC was empowered to "make such rules and regulations . . . as may be necessary in the executions

of its functions. . . ." *Id.* at 290 n.7. Just as ATF administers licensing and the Department of Justice handles prosecutions under the Gun Control Act, the FCC and the Department enforced the statutes concerning communications. "But the Commissioner's power is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [the statute], the Commission cannot employ the statute to make them so by agency action." *Id.* at 290.

The Court held that a criminal statute must be construed the same in both civil and criminal proceedings, i.e., strictly against the government and in favor of persons regulated by the statute:

It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. *There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.* We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly. *Id.* at 296 (emphasis added).

The rule of strict construction requires that power to promulgate regulations under a criminal statute—such as the Gun Control Act—be narrowly construed, and that conduct not clearly made criminal by statute cannot be made so by regulation. As noted by the Supreme Court in *American Broadcasting*, Congress had not specifically prohibited the conduct in question by statute. "The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power." *Id.* ATF's behavior is no different.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE, AS INTERPRETED BY THE COURT OF APPEALS, THIS IS THE FIRST FEDERAL BAN ON POSSESSION OF FIREARMS BY LAW ABIDING CITIZENS IN AMERICAN HISTORY, AND ITS CONSTITUTIONAL IMPLICATIONS ARE STAGGERING

A. Exercise Of A Power Under The Interstate Commerce Clause Requires that a Class Of Activities Have Some Minimal Effect On Interstate Commerce

This Court should not allow this matter to evade review because the Court of Appeals curtly found petitioner's unspecified "remaining arguments" to be "without merit." App. 9a. As interpreted by the Court of Appeals, this is the first federal ban in American history on possession by law-abiding persons of any type of firearm.

Nothing in § 922(o), the Congressional findings, or the legislative history suggest that Congress was exercising a power enumerated in Article I, § 8 of the Constitution, such as that Congress found mere possession of this firearm to be a burden on establishing post offices, coining money, or interstate commerce. The only evidence in the legislative record was the testimony of respondent Higgins that registered machineguns are virtually never used in crime and are not a law enforcement problem. Legislation to Modify the 1968 Gun Control Act: Hearings Before the House Judiciary Committee, 99th Cong., 1st & 2nd Sess., at 1165 (1987).¹

¹ Amici Center to Prevent Handgun Violence cites this source to show that machineguns are used in crime. (Brief at 5 n.7), but the testimony actually refers as well to handguns, semi-automatics and other types of firearms, and certainly not to *registered* machineguns. There is no evidence in the legislative record of a registered machinegun *ever* being used in a crime since passage of the National Firearms Act of 1934. 132 CONG. REC. S5363 (May 6, 1986) (statement of Senator Hatch). There is no mention of interstate commerce whatever, much less that possession of

Even without any interstate commerce nexus being suggested in the statute, its findings, or in the legislative record, respondents assume that Congress exercised its interstate commerce power in passage of § 922(o). Brief for the Respondent at 10-11. None of the cases cited by respondent upheld an exercise of the interstate commerce power under these conditions.

In sharp contrast to the case at bar, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116 (1942), the statute provided that the Secretary of Agriculture "shall regulate in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is *in the current of interstate or foreign commerce*, or which *directly burdens, obstructs, or affects, interstate or foreign commerce* in such commodity or product thereof." (Emphasis added.) Similarly, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Court found that activity may "be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ." Accordingly, the Court upheld regulation of wheat growing because it is an *economic* activity with a collective, substantial effect on interstate commerce.² *Id.* at 124-125.

machineguns (particularly registered ones) affect interstate commerce.

Amici Center (at 5 n.8) also cites the 1985 FBI Uniform Crime Reports, *Law Enforcement Officers Killed and Assaulted* 29-36. This could not have been considered by Congress, because it was not published until summer of 1986, after the Act passed. The Center claims that the Reports found four (4) fatalities from "automatic weapons," but one of these involved a ".25 cal. automatic handgun," which is clearly a semiautomatic pistol. *Id.* at 33. Moreover, the Reports found that of 78 felonious homicides of officers in 1985, the following weapons were used: handguns, 58; shotguns, 9; rifles, 3. Eleven (11) officers were killed with their own service arms. *Id.* at 12.

² Nor was respondent being candid with the Court in citing *United States v. Visman*, No. 89-10630 (9th Cir. Nov. 28, 1990),

In *Perez v. United States*, 402 U.S. 146, 155 (1971), the Supreme Court upheld a federal statute prohibiting loansharking because "the findings by Congress are quite adequate" to show that loansharking involves large-scale credit transactions and interstate economic activity, and thus affects interstate commerce. The Court cited extensive testimony and studies relied on by Congress to demonstrate the effects of loansharking on interstate commerce. "The essence of all these reports and hearings was summarized and embodied in formal congressional findings." *Id.* at 156.³

Respondent's quotations from *Perez* carefully delete any mention by the Court of the Congressional findings and extensive evidence in support concerning the effect on interstate commerce. For instance, respondent quotes only the second of the following sentences, ignoring the itali-

slip op. 14698 [190 U.S.App.Lexis 20621], since that decision was based on factual findings passed by Congress:

Title 21 U.S.C. § 801 contains the introductory provisions to the Drug Act, including Congressional findings and declarations. In § 801, Congress specifically found that a nexus exists between marijuana and interstate commerce. Congress concluded that controlled substances have a "detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress also found that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. § 801(4). Congress also found that "federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6).

³ The Court in *Perez* quoted the findings of Congress in the act involved as follows:

Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce. *Id.* at n.1.

cized portion: “Sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act. . . . In passing on the validity of the class last mentioned the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.” *Id.* at 152 (emphasis added).

Finally, respondent completely ignores the fact that *United States v. Bass*, 404 U.S. 336 (1971) construed the statutory ambiguity in favor of a criminal defendant to avoid any constitutional problem under the commerce clause. Brief for Respondent at 11. “We do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the ‘mere possession’ of firearms. . . .” 404 U.S. at 339 n.4 (emphasis added). “Absent proof of some interstate commerce nexus in each case, [a ban on possession of firearms by felons] dramatically intrudes upon traditional state criminal jurisdiction.” *Id.* at 350. Thus, the Court’s required showing of an interstate commerce nexus “preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.” *Id.* at 351.

B. The Second Amendment Precludes A Ban On Mere Possession Of A Type Of Firearm By a Law-Abiding Citizen

The Court of Appeals ruling is in conflict with *United States v. Miller*, 307 U.S. 174, 178 (1939), which recognized the test for Second Amendment protection to be whether an arm is ordinary military equipment or could contribute to the common defense.⁴ Contrary to respondent, *Miller* did not “hold” that possession of a short barreled shotgun (an arm not involved in the case at bar) is not protected by the Second Amendment. Brief for Respondent at 12. Instead, the Court stated that there

⁴ The district court agreed with petitioner’s interpretation of *Miller*. App. 21a.

was an “absence of any evidence” in the record, and “it is not with judicial notice that this weapon is any part of the ordinary military equipment. . . .” *Id.* Accordingly, the Court remanded the case to the district court, where an evidentiary hearing would have been available on that issue.

Respondent fails even to mention *United States v. Verdugo-Urquidez*, 108 L.Ed.2d 222, 232-32, 110 S.Ct. 1056, 1060-61 (1990), which noted that “‘the people’ protected by the Fourth Amendment and by the First and Second Amendments . . . refers to a class of persons who are part of a national community. . . .” Amici Center to Prevent Handgun Violence (Brief at 11 n.15) would change the Court’s wording to recognize Second Amendment protection only to “a class of persons” who are “part of an organized state militia.”⁵

The Second Amendment was clearly intended to protect an individual right to keep and bear private arms for lawful purposes generally. In *The Federalist* No. 46, James Madison referred to “the advantage of being armed, which the Americans possess over the people of almost every other nation.”⁶ Madison continued: “Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.”⁷

Ten days after Madison introduced the Bill of Rights in the House of Representatives, Tench Coxe published

⁵ Both Respondent (at 12) and Amici Center (at 10) cite lower court decisions which include dictum inconsistent with both *Miller* and *Verdugo-Urquidez*. However, none of these cases addressed a ban on possession of firearms by law-abiding citizens, but instead dealt with unregistered machineguns or firearms possessed by felons over which an interstate commerce nexus existed.

⁶ 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492 (1986).

⁷ *Id.* at 493.

his "Remarks on the First Part of the Amendments to the Federal Constitution,"⁸ which included the following: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."

The Senate rejected an explicit reservation of the state power to maintain militias as proposed by the Virginia convention: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . ."⁹ This highlighted the clear distinction between the "right" of "the people" to keep and bear arms, and the "power" of the "state" to arm and provide for militias.

The Senate also rejected a proposal to add "for the common defence" after "bear arms" in the Second Amendment.¹⁰ Had it succeeded, recognition of "the right of the people to keep and bear arms for the common defense" would have still been an individual right to have arms, but could have been interpreted as allowing arms to be kept only for common defense against foreign aggression or domestic tyranny, or that only military arms could be kept.

Neither the Supreme Court nor the appellate courts have considered the advanced historical scholarship published on the Second Amendment in the past decade.¹¹

⁸ Federal Gazette (Philadelphia), June 18, 1789, at 2, col. 1.

⁹ JOURNAL OF THE FIRST SESSION OF THE SENATE 75 (1820).

¹⁰ *Id.* at 77.

¹¹ See S. Levin, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

Given the fundamental nature of Bill of Rights guarantees and the passage of the first federal ban on possession of a type of firearm by law-abiding citizens in American history, this Court should grant certiorari.

CONCLUSION

The Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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